IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 21/11/2003

CORAM

THE HON'BLE MR.JUSTICE R.JAYASIMHA BABU
and
THE HON'BLE MR.JUSTICE S.R.SINGHARAVELU

W.P.No.16576 of 2001

M/s V.Guard Industries Ltd.,
241, Mettupalayam Road,
Coimbatore-641 043. ..Petitioner

-vs-

1.The Commercial Tax Officer,
P.N.Palayam Circle,
Coimbatore-641 018.

2 .The Tamil Nadu Taxation Spl. Tribunal,
rep. By its Registrar,
Second Floor, Singaravelar Maaligai,
Chennai-1. ..Respondents

Petition filed under Art.226 of the Constitution of India, praying for the issue of writ of certiorari as stated therein.

For petitioner : Mr.V.Balasubramanian

For respondents : Mr.T.Ayyasamy,
Spl. G.P. (Taxes)

:ORDER

(The order of the Court was made
by R.JAYASIMHA BABU, J.)

Rectification under Section 55 of the Tamil Nadu General Sales Tax Act has been refused on the ground that a subsequent judgment of the Supreme Court with regard to taxability of the sale was not required to be taken note of as a ground for rectification.

2. The assessee had purchased voltage stabilizers during the

assessment year 19 92-93 from a firm which was a charitable organization and was therefore exempt from the payment of salse tax. The point of levy of tax was the first sale. When the assessee resold the goods, it claimed that it was not liable to pay tax as it was a second sale. The assessing officer however proceeded to levy tax rejecting the plea that it was a second sale. The assessment for the year 1992-93 was made on 10.1.1994.

3. The Sales Tax Act was amended with effect from 17.7.1996 . The amended section 3 of the Act provides for levy of sales tax on the second sale, if the first sale has not suffered tax for any reason, in cases where the point of levy is the first sale. That amendment did not cover the assessment year 1992-93.

4. The Supreme Court in the case of Shanmuga Traders, etc. v. State of Tamil Nadu and others (114 STC 1), decided on 22.4.1998, held that when the tax is a single point tax, the point of levy is the first sale. If the tax is not collected at that point by reason of an exemption granted by the Government, such tax could not be levied on the sale subsequently effected.

5. After that judgment of the Supreme Court, the assessee applied for rectification of the assessment that had been made. The application for rectification was filed within the time allowed by law.

6. The assessing officer as also the appellate authority, and the Taxation Special Tribunal, have taken the view that it was not open to the assessee to seek such rectification by placing reliance on a judgment of the Supreme Court rendered subsequent to the assessment.

7. Learned counsel for the State sought to sustain that order of the Tribunal by placing reliance on two judgments of this Court in the case of The State of Tamil Nadu v. KS.M.G.Meenambal and Company (56 STC 8 2), decided on 15.12.82 and the case of State of Tamil Nadu v. Everest Trading Company (67 STC 148), decided on 5th January 1987.

8. Learned counsel for the State also placed reliance on the decision of a nine Judge Bench of the Supreme Court in the case of Mafatlal Industries Ltd. v. Union of India and others (111 STC 467), more particularly, the observations of Justice Jeevan Reddy, at page 523 of the judgment, in paragraph 17, that a suit or a writ petition will not lie for refund of taxes paid, on the ground that the payment was under a mistake, such mistake having been discovered after the superior Courts held in favour of the assessee, in a judgment rendered subsequent to the payment of the tax, even when the party claiming refund was not a party to that subsequent judgment. The learned Judge who spoke for the majority in that case observed that there was no provision in the Central Excise Act for reopening the concluded proceedings on the basis of a judgment subsequently rendered in the case of another assessee. The Court held that Art.265 would not enable an assessee to claim refund on the ground of the payment having been made under a mistake. The discussion in

that paragraph concluded thus:-

"We are, therefore, of the clear and considered opinion that the theory of mistake of law and the consequent period of limitation of three years from the date of discovery of such mistake of law cannot be invoked by an assessee taking advantage of the decision in another assessee's case. All claims for refund ought to be, and ought to have been, filed only under and in accordance with rule 11/Section 11-B and under no other provision and in no other forum. An assessee must succeed or fail in his own proceedings and the finality of the proceedings in his own case cannot be ignored and refund ordered in his favour just because in another assessee's case, a similar point is decided in favour of the manufacturer/assessee."

9. In that case, no question of rectification of assessment arose for consideration. The Court considered the question as to whether an assessee who had paid tax under a mistake can take advantage of a decision rendered by a higher forum in the case of another assessee by filing a suit or a writ petition, claiming refund of such amount of tax paid solely on the ground of mistake at the time of payment. The Court negatived any such right in an assessee. The Court did not hold that the assessee was not entitled to the statutory remedies available. What was in fact held was that the right of the assessee is governed by the statute and his remedies must be worked out under the statute except in cases where the levy itself was outside the statute and had been found to be unconstitutional by the superior courts.

10. Learned counsel for the assessee rightly brought to our attention the decision of the Supreme Court, which dealt with a case of rectification. In the case of S.A.L. Narayana Row v. Commissioner of Income Tax, Bombay City and another (64 ITR 67), a three Judge Bench of the Supreme Court held that an assessee under the Income-tax Act, who had paid tax for the assessment year 1952-53, pursuant to an assessment order made on 27.7.1955, as additional tax on the excess dividend declared by it, could maintain a petition for rectification on the strength of the dec ision rendered by the Court subsequently, holding that the levy of such additional tax on excess dividend was illegal. It affirmed the judgment of the High Court, which had treated that application of the assessee as one for rectification, although the assessee had couched it as a request for refund. The Supreme Court observed thus:-

".... The application to the Income-tax Officer was one in which the request for rectification of the order was implicit and the Commissioner in dealing with the application for refund treated that application in that light."

The Supreme Court concluded, "In our view the High Court was right in making the order directing the Commissioner to refund the amount of tax which was illegally collected.

11. The other judgment relied on by the counsel for the assessee is the case of Poothundu Plantations Pvt. Ltd. v. Agricultural Income-tax Officer (221 ITR 557). In that case, the Court was concerned with a provision

for rectification in the Kerala Agricultural Income-tax Act which also, like Section 55 of the Tamil Nadu General Sales Tax Act, permitted rectification of any mistake apparent on the face of the record.

12. While dealing with such a claim, although on facts it held that rectification was not permissible in that case, as the assessee had merely sought to argue by analogy that a decision rendered by a superior Court with reference to another provision of the same Act would govern a different provision under which it had paid that tax, in the course of the order it observed thus:-

" There can be no doubt that only an apparent error of fact or law can be rectified by an officer. If the mistake of law has to be established by construing the words of a section to find its proper meaning, then such an error cannot normally be a rectifiable error under Section 36. If two views are possible, then obviously the error will not be an error apparent from the record.

It is, however, well-settled that if the Supreme Court has construed the meaning of a section, then any decision to the contrary given by any other authority must be held to be erroneous and such error must be treated as an error apparent on the record."

13. It is, therefore, clear that notwithstanding what may have been done by any other authority below the Supreme Court, when the Supreme Court pronounces on the true position of law any decision rendered by any other authority contrary to that is required to be regarded as an error which is apparent on the record. Rectification of such an error within the period permissible under law and in accordance with the provisions of the statute is clearly required to be effected.

14. This Court in the case of Raja M.A. Muthiah Chettiar (deceased) v. Commissioner of Income-tax (238 ITR 505) has inter alia held thus:-

"In cases where the pronouncement of the Supreme Court subsequent to the original decision of the Tribunal on the effect of the application of the law is brought to the notice of the Tribunal by way of an application for rectification, and if the Tribunal is of the view that, interests of justice would require such an application be allowed, it would be open to the Tribunal to do so."

It was also observed,

"The effect of the decision of the Supreme Court is to settle the law on the point on which the decision is rendered by it and that law binds all authorities all over the country."

15. While the last mentioned decision of this Court in the case of Raja M.A.Muthiah Chettiar (deceased) v. Commissioner of Incometax (238 ITR 505) is in accordance with the law that has been laid down by the Supreme Court in the cases of S.A.L. Narayana Row v. Commissioner of Income Tax,

Bombay City and another (64 ITR 67) and Poothundu Plantations Pvt. Ltd. v. Agricultural Income-tax Officer (221 ITR 55 7), the same cannot be said of the decisions of this Court on which the Revenue relies. Although in the case of Everest Trading Company (67 STC 148) the decision of the Supreme Court in the case of Narayana Row (64 ITR 67) was referred to, the crucial fact that that decision dealt with an application for rectification was omitted to be noticed.

16. The decisions of this Court reported in (67 STC 148) and (5 6 STC 82) must be held to have been impliedly overruled by the decision of the Supreme court in the case of Poothundu Plantations Pvt. Ltd. v. Agricultural Income-tax Officer and others (221 ITR 557), besides not being in accordance with the law declared in the case of Narayan Row.

17. The impugned order of the Tribunal and other authorities, therefore, cannot be sustained. The application for rectification filed by the petitioner shall stand allowed.

Index: Yes

Website: Yes